Hong Yik Trading v Liziz Plantation Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-29–05 OF 2016(D)
ARIFIN ZAKARIA CHIEF JUSTICE, AHMAD MAAROP, HASAN LAH, ZAINUN ALI AND ABU SAMAH NORDIN FCJJ
27 MARCH 2017

Evidence — Burden of proof — Counterclaim — Defendant asserted in counterclaim that plaintiff damaged its land — Whether defendant failed on balance of probabilities to prove that assertion — Whether defendant's officers in fact certified that appellant satisfactorily carried out its works on defendant's land as per contract and approved payment for works — Whether defendant never complained about plaintiff's alleged shoddy work until after plaintiff sued defendant for balance of payment — Whether plaintiff's witnesses corroborated each other in showing plaintiff had carried out its works on defendant's land satisfactorily — Whether trial court rightly rejected attempt by defendant to challenge credibility of plaintiff's witnesses without cogent proof — Evidence Act 1950 s 101

The respondent appointed the appellant to carry out construction and cleaning works ('the works') on its plantation. Claiming that it had carried out the works fully and satisfactorily, the appellant sued the respondent in the High Court for failure to pay a balance of RM397,416 for the completed works. The respondent counterclaimed for RM146,857.95 being the difference between the sum claimed by the appellant and the sum the respondent alleged it incurred to hire two other contractors ('the two contractors') to remedy alleged defects in the works including damage to the land caused by the appellant. The High Court allowed the appellant's claim and dismissed the counterclaim. The court found that although the respondent had proved that damage had occurred to its land and that the two contractors had repaired the damage, it was not proven that the damage was caused by the appellant or by heavy monsoon rains as was suggested by the appellant's counsel. On the respondent's appeal, the Court of Appeal ('the COA') allowed the respondent's counterclaim to be set off against the appellant's claim and ordered the appellant to pay the respondent the RM146,857.95. The COA held, inter alia, that: (a) there was no evidence to show that heavy monsoon rain had damaged the respondent's land necessitating the engagement of the two contractors to carry out the remedial works; (b) as the parties never mentioned heavy monsoon rain in their

pleadings, it was wrong of the trial court to consider it as an issue; (c) the trial court did not appreciate or evaluate the testimonies of the witnesses for the two contractors as to why they were engaged to carry out the remedial works; and (d) there was no discussion in the trial court's judgment of the testimony of the witnesses as to the probable cause of the damage to the respondent's land. The instant appeal was against the COA's decision.

Held, allowing the appeal, setting aside the COA's decision and upholding the decision of the High Court:

(1) The trial judge was right to dismiss the respondent's counterclaim on finding that it had, on balance of probabilities, failed to discharge its burden of proof with regard to the counterclaim. The burden of proof rested throughout the trial on the party who asserted that certain facts existed (s 101 of the Evidence Act 1950). Where a party on whom the burden of proof lay had discharged that burden, then the evidential burden shifted to the other party. But if the party on whom the burden of proof lay failed to discharge it, the other party need not call any evidence (see paras 12 & 28).

(2) The respondent alleged that the appellant failed to carry out the works as covenanted under cl 2 of the contract, causing the land to be damaged and in need of repair and that, consequently, the respondent had to engage two other contractors to carry out remedial works at a total cost of RM554,274.45. Since the issue was raised by the respondent, the burden lay upon the respondent to prove the same. The evidence of the four witnesses called by the respondent — SD1, SD2, SD3 and SD4 — failed to support its counterclaim. The totality of their evidence did not go to show that it was the appellant's poor quality of work which had caused the damage to the land. In fact, SP2, SP3 and SP4, who were authorised by SD1 to carry out inspection work on the land testified that the appellant had carried out the works satisfactorily (see paras 13 & 15).

(3) SD3 and SD4, who testified on behalf of the two contractors, had absolutely no knowledge of what had actually caused the damage to the land. They came onto the land after the damage had already occurred. Since their evidence was not directly relevant to the main issue in the counterclaim, ie, whether it was the appellant's shoddy work which had caused the damage to the land, the trial court did not commit any error in disregarding their evidence. The evidence of the respondent's witnesses only confirmed the fact that there was damage to the land when it was inspected. None of the respondent's witnesses could positively say that it was the appellant's negligence which had caused the damage (see paras 16–18).

(4) As to the COA's holding that the trial judge wrongly found that the damage to the land might have been caused by heavy rain when the question of heavy rain was never pleaded and nor was there evidence to support it, it was erroneous to elevate the issue of inclement weather as the primary issue in this case since that issue had nothing to do with the counterclaim. The main issue to be resolved in the counterclaim was whether it was the appellant's acts or omissions that caused damage to the land. The gist of the trial judge's decision was that although the respondent had proven that there was damage to the land, it failed to prove that the damage was caused by the appellant and not by the heavy rain (see paras 19 & 21).

(5) The witnesses who testified for the appellant corroborated each other in saying that the appellant had completed the works in accordance with the specifications and instructions of the respondent. The witnesses consistently maintained that the appellant had repaired all defective works before the works were approved. The respondent's authorised officers, SP2 and SP3, had approved the works as having being completed and had authorised payment for same. If the respondent was dissatisfied with the appellant's quality of works, it should have raised the issue at the material time, ie, before the works were approved by its authorised officers. If any remedial works were required to be done, the respondent should have instructed the appellant to carry out such works before the works were approved and payments were authorised by the respondent's employees. It was not open for the respondent to claim that the appellant's works were defective after the works were already approved by its duly authorised officers (see paras 22–24).

(6) The respondent's attempt to challenge the credibility of the appellant's witnesses was rejected by the trial court which found that the allegations levelled against SP2, SP3 and SP4 by the respondent were not corroborated by any independent evidence and that the court could not be moved to act simply on a mere allegation or suspicion. This court wholly agreed with that finding. The credibility of a witness was primarily a matter for the trial court to decide and an appellate court should be slow to disturb a trial court's finding on the credibility of a witness (see paras 25–27).

[Bahasa Malaysia summary

Responden melantik perayu untuk menjalankan kerja-kerja pembinaan dan pembersihan ('kerja-kerja tersebut') di ladangnya. Mendakwa bahawa ia telah menjalankan kerja dengan sepenuhnya dan memuaskan, perayu menyaman responden di Mahkamah Tinggi bagi kegagalan untuk membayar baki sebanyak RM397,416 untuk kerja-kerja yang telah siap. Responden menuntut

balas bagi jumlah sebanyak RM146,857.95 sebagai perbezaan di antara jumlah yang dituntut oleh perayu dan jumlah responden mendakwa ia tanggung untuk mengupah dua kontraktor lain ('kedua-dua kontraktor') untuk meremedi dakwaan kecacatan di dalam kerja-kerja termasuk kerosakan kepada tanah yang disebabkan oleh perayu. Mahkamah Tinggi membenarkan tuntutan perayu dan menolak tuntutan balas tersebut. Mahkamah mendapati bahawa walaupun responden telah membuktikan bahawa kerosakan berlaku kepada tanahnya dan bahawa kedua-dua kontraktor telah memperbaiki kerosakan tersebut, ia tidak dibuktikan bahawa kerosakan adalah disebabkan oleh perayu atau oleh hujan monsun yang lebat seperti yang dicadangkan oleh peguam perayu. Atas rayuan responden, Mahkamah Rayuan ('MR') membenarkan tuntutan balas responden untuk penepian terhadap tuntutan perayu dan memerintah perayu untuk membayar responden jumlah RM146,857.95 tersebut. MR memutuskan, antara lain, bahawa: (a) tidak terdapat keterangan untuk menunjukkan bahawa hujan monsun yang lebat telah merosakkan tanah responden memerlukan pengupahan kedua-dua kontraktor untuk menjalankan kerja-kerja pembaikan; (b) memandangkan pihak-pihak tidak pernah menyebut hujan monsun yang lebat di dalam pliding mereka, mahkamah perbicaraan adalah salah untuk mempertimbangkannya sebagai isu; (c) mahkamah perbicaraan tidak menghargai atau menilai keterangan-keterangan saksi-saksi untuk kedua-dua kontraktor mengapa mereka diupah untuk menjalankan kerja-kerja pembaikan; dan (d) tidak terdapat perbincangaan di dalam penghakiman mahkamah perbicaraan mengenai keterangan saksi-saksi terhadap sebab kemungkinan kerosakan kepada tanah responden. Rayuan ini adalah terhadap keputusan MR.

Held, membenarkan rayuan, mengenepikan keputusan MR dan mengesahkan keputusan Mahkamah Tinggi:

(1) Hakim bicara adalah betul menolak tuntutan balas responden atas daapatan bahawa ia telah, atas imbangan kebarangkalian, gagal untuk melepaskan beban pembuktiannya berkaitan tuntutan balas tersebut. Beban pembuktian terletak sepanjang perbicaraan ke atas pihak yang mendesak bahawa fakta tertentu wujud (s 101 Akta Keterangan 1950). Pihak di mana terletak beban pembuktian ke atasnya telah melepaskan beban tersebut, dengan itu beban jelas beralih kepada pihak lain. Tetapi jika pihak di mana terletak ke atasnya beban pembuktian gagal untuk melepaskannya, pihak yang lain tidak perlu mengemukakan apa-apa keterangan (lihat perenggan 12 & 28).

(2) Responden mendakwa bahawa perayu gagal untuk menjalankan kerja-kerja seperti dijanjikan di bawah klausa 2 kontrak, menyebabkan tanah rosak dan perlu pembaikan dan bahawa, akibatnya, responden telah mengupah dua kontraktor lain untuk menjalankan kerja-kerja pembaikan pada kos keseluruhan sebanyak RM554,274.45.

Memandangkan isu dibangkitkan oleh responden, beban terletak ke atas responden untuk membuktikannya. Keterangan keempat-empat saksi yang dipanggil responden — SD1, SD2, SD3 dan SD4 — gagal untuk menyokong tuntutan balasnya. Keseluruhan keterangan mereka tidak menunjukkan bahawa ia adalah kualiti kerja yang buruk perayu yang menyebabkan kerosakan kepda tanah tersebut. Sebenarnya, SP2, SP3 dan SP4, yang diberi kuasa oleh SD1 untuk menjalankan kerja pemeriksaan ke atas tanah tersebut yang memberikan keterangan bahawa perayu telah menjalankan kerja-kerja secara memuaskan (lihat perenggan 13 & 15).

(3) SD3 dan SD4, yang memberikan keterangan bagi pihak kedua-dua kontraktor tersebut, tidak mempunyai apa-apa pengetahuan mengenai apa yang sebenarnya menyebabkan kerosakan kepada tanah tersebut. Mereka masuk ke tanah tersebut selepas kerosakan telah berlaku. Memandangkan keterangan bukan secara langsung relevan kepada isu utama dalam tuntutan balas tersebut, iaitu, sama ada ia adalah kerja tidak bermutu perayu yang menyebabkan kerosakan kepada tanah, mahkamah bicara tidak melakukan apa-apa kesilapan dalam mengabaikan keterangan mereka. Keterangan saksi-saksi responden hanya mengesahkan saksi-saksi mengesahkan fakta bahawa terdapat kerosakan kepada tanah apabila ia diperiksa. Tidak seorang saksi responden boleh secara positif menyatakan bahawa ia adalah kecuaian perayu yang menyebabkan kerosakan tersebut (lihat perenggan 16–18).

(4) Terhadap keputusan MR bahawa hakim bicara telah salah mendapati bahawa kerosakan kepada tanah mungkin disebabkan oleh hujan lebat apabila soalan hujan lebat tidak pernah diplidkan dan juga tidak terdapat keterangan untuk menyokongnya, ia adalah salah untuk mengangkat isu cuaca buruk sebagai isu utama dalam kes ini memandangkan isu tersebut tidak kena mengena dengan tuntutan balas tersebut. Isu utama untuk diselesaikan di dalam tuntutan balas adalah sama ada ia adalah tindakan atau ketinggalan perayu yang menyebabkan kerosakan kepada tanah tersebut. Inti pati keputusan hakim bicara adalah walaupun responden telah membuktikan bahawa terdapat kerosakan kepada tanah, ia gagal untuk membuktikan bahawa kerosakan adalah disebabkan oleh perayu dan bukan oleh hujan lebat (lihat perenggan 19 & 21).

(5) Saksi-saksi yang memberi keterangan bagi perayu menyokong satu sama lain dalam menyatakan bahawa perayu telah menyiapkan kerja-kerja mengikut spesifikasi dan arahan responden. Saksi-saksi secara konsisten mengekalkan bahawa perayu telah memperbaiki kesemua kerja-kerja yang cacat sebelum kerja-kerja diluluskan. Pegawai-pegawai responden yang diberi kuasa, SP2 dan SP3, telah meluluskan kerja-kerja sebagai siap

dan telah meluluskan pembayaran untuknya. Jika responden tidak berpuas hati dengan kualiti kerja-kerja perayu, ia patut membangkitkan isu tersebut pada masa material, iaitu, sebelum kerja-kerja diluluskan oleh pegawai-pegawai yang diberi kuasanya. Jika apa-apa kerja pembaikan yang dikehendaki dibuat, responden patut mengarahkan perayu untuk menjalankan kerja-kerja sedemikian sebelum kerja-kerja diluluskan dan bayaran diluluskan oleh pekerja-pekerja responden. Ia tidak terbuka bagi responden untuk menuntut bahawa kerja-kerja perayu adalah cacat selepas kerja-kerja telah diluluskan dengan wajarnya oleh pegawai-pegawainya (lihat perenggan 22–24).

(6) Percubaan responden untuk mencabar kredibiliti saksi-saksi perayu ditolak oleh mahkamah perbicaraan yang mana mendapati bahawa tuduhan-tuduhan yang dikenakan terhadap SP2, SP3 dan SP4 oleh responden tidak disokong oleh apa-apa keterangan bebas dan bahawa mahkamah tidak boleh bertindak hanya atas tuduhan atau disyaki semata-mata. Mahkamah ini bersetuju secara keseluruhan dengan dapatan tersebut. Kredibiliti saksi adalah perkara utama bagi mahkamah perbicaraan untuk memutuskan dan mahkamah rayuan patut perlahan untuk campur tangan dapatan mahkamah perbicaraan atas kredibiliti saksi (lihat perenggan 25–27).]

Notes

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 670–1054.

Cases referred to

Chew Boon Ee v L Ramanathan Chettiar & Ors [1959] MLJ 235, PC (folld)
China Airlines Ltd v Maltran Air Corp Sdn Bhd [1996] 2 MLJ 517, FC (folld)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)
Stoney v Eastbourne Rural District Council [1927] 1 Ch 367, CA (refd)

Legislation referred to

Evidence Act 1950 s 101

Jegadeeson Thavasu (Jega Kumar & Partners) for the appellant.
N Chandran (Tenh Cheng Tiap and Ranjan Chandran with him) (CK Lim, Tehn & Chong) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by appellant, (the plaintiff in the High Court) against the Court of Appeal's decision dated 18 August 2014. On 27 February 2014, the High Court had allowed the appellant's claim and dismissed the respondent's counterclaim (the defendant in the High Court). Dissatisfied with the High Court's decision, the respondent successfully appealed to the Court of Appeal against that decision.

[2] Leave to appeal was granted by this court on 28 April 2016. The question of law posed to us reads as follows:

> When a party on a certain date had confirmed the quantity and quality of the work done as having been completed to their satisfaction as per the contract and had authorised payment for such completed works, can that party resile from that position and mount a counterclaim based on alleged defective work or is the party now estopped from disputing such approval/authorisation.

Brief facts

[3] The pertinent facts are as follows. The respondent appointed the appellant to do constructions works and cleaning of the respondent's plantation ('the works'). The appellant claimed that it had carried out the works but was not paid in full. The appellant claimed the outstanding sum of RM397,416 which it claimed to be due and payable to the appellant by the respondent for the works.

[4] There were written contracts executed between the appellant and respondent for the works. The contract was contained in the letter of appointment dated 13 November 2009 and the acceptance of the same by the appellant. There were also four other written contracts between the parties. Three of the four contracts were all dated 1 August 2010. Each of these contracts was for different work description. However, all the three contracts have identical terms and conditions.

[5] The fourth contract is a contract to extend the contract period under the three earlier contracts. The extension contract was made on 1 January 2011. Under the extension contract the parties agreed that the contract period under the three earlier contracts be extended from 1 January 2011 'until the completion of the whole entire area'. The relevant clause in the extension contract reads:

A Due to bad weather and machinery breakdown, therefore both parties had agreed to extend this contract period from 1st January 2011 until completion of the whole entire area.

Others (sic) terms and conditions including the contract rate in the said agreement remains unchanged.

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[6] The respondent contended that the appellant failed to carry out the works as stipulated in the contract in particular as required under cl 2 of the contract. The respondent claimed that it had to appoint two other contractors to complete the remedial works at the total cost of RM554,264.45. In the C circumstances, the respondent filed a counter claim against the appellant in the High Court to recover the sum of RM146,857.95 being the difference between the sum claimed by the appellant for the works and the sum incurred by the respondent to complete the remedial works.

D

[7] The High Court allowed the appellant's claim and dismissed the respondent's counterclaim. The learned High Court judge held that:

E Berdasarkan kertas kausa, keseluruhan keterangan yang dikemukakan serta hujahan yang dikemukakan oleh peguamcara yang terpelajar kedua-dua pihak, atas imbangan kebarangkalian saya mendapati plaintif berjaya membuktikan tuntutan mereka terhadap defendan. Sebaliknya saya mendapati defendan gagal untuk membuktikan tuntutan balas mereka terhadap plaintif ...

PROCEEDINGS IN THE COURT OF APPEAL

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[8] Aggrieved, the respondent then appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal with cost. The Court of Appeal held:

G [29] We have carefully read the written judgment of the learned High Court Judge in instant appeal. Unfortunately we could not find any discussion on the testimony of the witnesses as the probable cause of the defective works that required to be remedied. We find that there is no appreciation or evaluation of the testimony by the respondent's witnesses particularly that of SD3 and SD4 as to why they were engaged to do the remedial work.

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[30] For the above reason, we allowed the appeal by the appellant on the counterclaim and allowed it to be set off against the sum claimed by the respondent and ordered that the respondent pay the appellant the balance of RM146,857.95 under the counterclaim. We order no cost here and below.

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PROCEEDINGS IN THIS COURT

[9] Learned counsel for the appellant submitted that the sole issue in this case is 'whether the appellant had completed the works in accordance with specifications and the same was approved by the respondents nominated and/or appointed representatives'.

[10] With regards to the respondent's counterclaim, learned counsel for the appellant submitted that, the learned High Court judge had found that the respondent had proven that there was damage to the land that needed to be repaired, and repair works had been carried out and completed by the new contractors ie Saga Timur and JWY Maju who were appointed by the respondent. However, the learned High Court judge also found that the respondent had failed to prove that the damage to the land was caused by the appellant, and not by the heavy monsoon rain as suggested and submitted by learned counsel for the appellant (paras 30–32 of the learned High Court judge's judgment).

[11] In allowing the appeal, the Court of Appeal made the following findings:

(a) the appellant failed to adduce any evidence to prove that the heavy monsoon rain was the cause of the defective works that required remedial action by other contractors engaged by the respondent (para 15 of the learned Court of Appeal judges' judgment). Besides, the learned judges were also unable to find any discussion by the learned High Court judge on the testimony of the witnesses as to the probable cause of the defective works that required to be remedied (para 29 of the learned Court of Appeal judges' judgment);

(b) in addition, the heavy monsoon rain issue was never pleaded in any of the pleadings. Therefore, the Court of Appeal opined that the High Court judge was wrong in taking into consideration the heavy monsoon rain when it is not even pleaded; and

(c) the Court of Appeal was of the view that the High Court failed to take into consideration the evidence of SD3 and SD4 in coming to its decision.

Learned counsel for the appellant submitted that the findings of the Court of Appeal were against the weight of the evidence before the court.

FINDINGS OF THIS COURT

[12] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s 101 of the Evidence Act 1950). Where

a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence. This is highlighted in the case of *Selvaduray v Chinniah* [1939] 1 MLJ 253 where Terrell Ag CJ stated:

> ... it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case, there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial, the learned Judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case, the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff.

In the case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 at p 87, Salleh Abas FJ (as he then was) restated the same position in the following words:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors AIR* 1961 SC 1474 at p 1478 and *Raghavamma v Chenchamma AIR* 1964 SC 136, 43). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act 1950 is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* (7th Ed) paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and. other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

Similarly, in the case of *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367, Lord Hanworth MR had articulated on the issue of the burden of proof in the following manner:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feather on one side or the other, and of saying that if there were two feathers on one side and one on the other, that would be sufficient to shift the onus. What is meant is, that in the first instance, the party on whom the onus lies must prove his case sufficiently to justify a judgement in his favour if there is no other evidence given.

[13] Coming back to the respondent's counterclaim, the respondent alleged that the appellant had failed to carry out the works to the satisfaction of the respondent as covenanted under cl 2 of the contract, causing the land to be damaged and in need of repair. As a consequence, it had to engage two other contractors to carry out the remedial works at the total cost of RM554,274.45. The issue which the High Court needed to deliberate on was whether or not, the appellant failed to complete the works in accordance with the specifications as agreed under the contract as alleged by the respondent. Since the issue was raised by the respondent, we hold that the burden lies on the respondent to prove the same. It lies on the respondent to discharge the said burden.

[14] To prove its case, the respondent had called the respondent's managing director ('SO1'), the respondent's estate manager ('SO 2'), the Director of Saga Timur Sdn Bhd ('SO3') and the Director of JWY Maju Jaya Enterprise ('SO4'). Saga Timur Sdn Bhd and JWY Maju Jaya Enterprise were the contractors appointed by the respondent to carry out remedial works on the land. The evidence of SO1, SO2, SO3 and SO4 all pointed to the facts that the terraces and the slopes were defective as they were not properly constructed by the appellant to the extent that they required remedial work.

[15] Having scrutinised the evidences of SD1, SD2, SD3 and SD4 in totality, we are of the view that the evidence adduced through these witnesses did not go to show that it was the appellant's poor quality of work which had caused the damage to the land. Although SD1 was the managing director of the respondent, and was in charge of the overall running of the company, he did not personally inspect the appellant's works on the land at the material time. Instead, SD1 had authorised SP2, SP3 and SP4 to perform the inspection work on the land and according to them, the appellant had performed the works satisfactorily. As for SD2, he was only appointed as the estate manager of the respondent's Kuala Betis II estate on 18 July 2011, after the works on the land had been fully completed by the appellant.

[16] As for SD3 and SD4, they were the directors of the contractors appointed by the respondent to carry out the remedial works. In their testimonies, they stated that they were brought in by the respondent to carry out remedial works on the land. In other words, they had absolutely no knowledge of what had actually caused the damage to the land apart from what had been told to them by SO1.

[17] One of the issues raised by the Court of Appeal in its judgment was the fact that the High Court judge did not take into consideration the evidence of SO3 and SO4 in dismissing the respondent's counterclaim. However, the evidence of SO3 and SO4 is not directly relevant to the main issue in the counterclaim; which is whether it was the appellant's shoddy works which had

caused damage to the land. They came onto the land after the damage to the land had already occurred. For those reasons, we hold that the learned High Court judge had not committed any error in disregarding their evidence in coming to his decision.

[18] We are also of the view that, if at all, the evidence of the respondent's witnesses were to be considered, they could only be used to confirm the fact that there was damage to the land when they inspected the land. None of the witnesses whom the respondent had produced before the court could positively say that it was the appellant's negligence in performing the works on the land which had caused damage to the land. As we stated earlier, in the counterclaim, it is for the respondent to prove that the damage to the land as alleged was caused by the appellant's failure to perform the works as per the specifications. For the reasons stated above, we hold that the evidence of SD1, SD2, SD3 and SD4 failed to support the respondent's counterclaim.

[19] Another issue which the Court of Appeal had raised in its judgment is that the trial judge had erred in his finding that the damage to the land was caused by heavy rain when there is no evidence before the court to support such finding. Furthermore, heavy rain was not pleaded by the appellant. Thus, the trial judge's finding is against the strict principle of pleading that parties are bound by their pleadings.

[20] For ease of reference, we produce below the finding of the trial judge on this issue which reads:

> Saya mendapati bahawa defendan (*the respondent*) berjaya membuktikan bahawa terdapatnya kerosakan pada tanah yang perlu diperbaiki dan pembaikian telah dilakukan oleh kontraktor baru yang mereka lantik. Namun, saya mendapati mereka gagal membuktikan bahawa kerosakan tersebut adalah diakibatkan oleh plaintiff dan bukannya akibat hujan lebat musim hujan sepertimana yang dicadangkan oleh peguam plaintif terpelajar.

[21] The gist of the learned trial judge's decision is that although the respondent had succeeded in proving that there was damage to the land, it failed to prove that the damage was caused by the appellant and not by the heavy rain. The main issue to be resolved in the counter claim is whether it was the appellant's acts or omissions which had caused damage to the land. It is erroneous to elevate the issue of inclement weather as the primary issue in this case, since the issue has nothing to do with the counterclaim. The critical issue in this case is who caused the damage to the land.

[22] In this regard, it is pertinent to consider the evidence of the appellant's four witnesses, including the appellant himself. Three of the witnesses were former employees of the respondent. They were the general manager ('SP2'),

the assistant general manager ('SP3') and the senior general manager ('SP4'). They were the respondent's authorised officers who had been appointed by the respondent to supervise and monitor the works. All the four witnesses corroborated each other in saying that the appellant had completed the works in accordance with the specifications and instructions of the respondent.

[23] The witnesses also consistently maintained that the appellant had repaired all the defective works before the works received their approval. This is evident in the fact that the respondent's authorised officers, namely SP2 and SP3 had approved the works as being completed by the appellant, and had subsequently authorised payment as evident by exhs 'P8', 'P9', 'P10', 'P11' and 'P12'.

[24] As a matter of argument, if indeed the respondent was not satisfied with the appellant's quality of works, they should have raised the issue at the material time, that is before the works were approved by its authorised officers. If any remedial works is required, the respondent should have instructed the appellant to carry out the works before the works were approved, and payments authorised by the respondent's employees. It is not open for the respondent to claim that the appellant's works were defective after the works had already been approved by its duly authorised officers.

[25] There was also an attempt by the respondent to challenge the credibility of the appellant's witnesses by alleging that they (SP2, SP3 and SP4) were untruthful witnesses and thus, their evidence ought to be rejected. According to SD1, their employment with the respondent was terminated on the ground that they had been dishonest in carrying out their duty in approving and verifying the appellant's claims and a police report had been lodged against them, but the respondent admitted that no action had been taken by the police against any of them.

[26] The fact that SP2, SP3 and SP4 had been terminated from their employment on the ground of dishonesty and a police report lodged against them does not necessarily follow that their evidence ought to be disregarded by the court. On this issue, we are in complete agreement with the learned trial judge that the allegations levelled against SP2, SP3 and SP4 by the respondent are not corroborated by any independent evidence. The court cannot simply be moved to act by a mere allegation or suspicion.

[27] Further, the credibility of a witness is primarily a matter for the trial court to decide. As observed by Mohamed Dzaiddin FCJ in the case of *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517 at p 527:

> ... it is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court

A of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 (HL) per B Lord Porter at p 167).

The same view was expounded by the Privy Council in the case of *Chew Boon Ee v L Ramanathan Chettiar & Ors* [1959] MLJ 235 at p 239, where The Rt Hon LMD De Silva had this to say:

C A Court of Appeal has no doubt jurisdiction to reverse a trial court on all questions of fact and law but as stated by Lord Reid in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 'it is only in rare cases that an appeal court could be satisfied that the trial Judge has reached a wrong decision about the credibility of a witness'. The principles which should guide a Court of Appeal dealing with findings of fact by a D trial court have been set out in many cases and several of them have been cited to Their Lordships. They think it would be sufficient for the purposes of this appeal to refer to two passages from the judgment of Viscount Simonds in *Benmax v Austin Motor Co Ltd* the case mentioned earlier. Referring to cases previously decided he said:

E > I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned F judge.

We agree with the above observations of the learned judges, stated above, in that the appellate court should be slow in disturbing the finding of the trial court especially when the finding turns on the credibility of witnesses as in the G present case.

CONCLUSION

[28] Premised on the facts and circumstances of this case, we agree with the H finding of the learned trial judge that the respondent had, on the balance of probabilities, failed to discharge the burden of proof which rest on the respondent as regards the counterclaim. The learned trial judge was right in dismissing the counterclaim of the respondent. That in our view is sufficient to dispose of the present appeal. It is therefore not necessary for us to answer the I question for which leave had been granted by this court. In the result, the appeal is allowed with costs both here and in the Court of Appeal. The order of the Court of Appeal is accordingly set aside. Hasan Lah FCJ had read this judgment in draft and agreed to it.

Appeal allowed, Court of Appeal's decision set aside, decision of High Court upheld.

Reported by Ashok Kumar